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THE ORIGIN OF THE ENGLISH CONSTITUTION,[1] I.

THE problem of the origin of the English Constitution is the problem of ascertaining how, and, if possible, where the constitutional development of that country branched off the line of growth common to medieval monarchies. At some point of time England entered a road new in history, trodden by no other people and leading to a result never arrived at elsewhere—full and free national self-government, under the forms of a monarchy and the theory of an unlimited kingship. From a constitutional beginning practically identical, France came out of the Middle Ages with an absolute, and England with a limited monarchy. To find the how and when of this divergence is to fix the origin of the English constitution.

It is impossible to place the date earlier than 1215. England to the end of John's reign was a feudal state. In the general constitution and in the individual institutions by which the constitution was operated, there had been as yet no essential departure from that type as seen in all the feudal countries. One great difference of course existed—the powerful monarchy, the close centralization of the Anglo-Norman state—but while this difference strongly affected the results of government, it had affected methods and machinery scarcely at all. In two directions we may say that it had. Looking from above it had produced a more logical and ideal development of the feudal system, as in the financial rights of the sovereign, relief, wardship and marriage, in the reality of

[1] I publish here a preliminary outline which I hope to expand in time into a detailed account of the origin of the English constitution. I use the word "constitution" in this title not in the sense of the whole body of institutions which make up the machinery of the state, but in the sense which it bears in some uses of the modern phrase "constitutional government", the limited monarchy, the distinguishing feature which made the English a constitution of a new type.

feudal service from the great baron, and of the service desired from the church in the feudal organization; in the other direction, there had resulted a less complete partition of political powers than was natural to feudalism, a difference which is seen most easily, but not alone, in the imperfect development of private jurisdictions in England. These characteristics all mean a stronger kingship.

Nor had the strong monarchy as yet begun the task of transforming the feudal into a modern organization, at least not in such a way as to produce immediate results. In two important matters innovations had been made, but of so slight a character by that date as scarcely to seem innovations—in the judicial system and in taxation. But again, if completely carried out as begun, both these changes would have had for their result to strengthen the sovereign still further. As a matter of fact this tendency to increased power John used to as full advantage as was possible for that time. I believe that the tremendous power which he exercised over a reluctant baronage and a hostile but cowering church, even until after the battle of Bouvines, though it had begun to weaken before that date, has never been emphasized enough. If one considers the situation carefully, especially after the ineffective interdict and excommunication, it seems impossible to state too strongly the utter powerlessness of every element in the state as against the king. I doubt if there is to be found a like instance of arbitrary power in medieval history in the case of a sovereign so nearly dependent on himself alone. To be sure John had been forced to yield in 1213, but he had yielded so suddenly and with such consummate skill in adapting what he did to the one real necessity of the case and no more, that his hold upon the kingdom was for the time being only slightly loosened.[2] But whatever one may think of John's position, the situation on the eve of 1215 promised a very different outcome of English history from that which actually occurred. It is impossible to find in it any reasons for suspecting that England had departed, or was about to depart, in any essential matter, from the usual development of a feudal constitution, least of all in the direction of a limited monarchy.

If now we turn to the time following 1215 we are confronted with a similar condition of things. It is a hundred and fifty years

[2] My argument in volume II. of Hunt and Poole's *The Political History of England*, p. 424, for the view that John's act of homage was of his own policy, and not demanded by the pope, has been questioned. This view still seems to me decidedly the more probable. It is less important, however, to determine what one shall believe about a question which must always be a matter of opinion, than to see how indispensable the act was to John's security, and that nothing less would have averted the French invasion.

after that date before we can find any institution forming a permanent part of the constitution, not merely a temporary experiment, of which we can say that it had for its object to secure the operation of a limited monarchy. It is generations of time in other words before we can detect any essential departure from the type of the continental state which we may be certain is in the direction of a limited monarchy.[3] All the constitutions which grew out of the feudal, including the English, were alike in their general features so far as the machinery of government was concerned. In all alike the *curia regis,* the great mother of institutions, gave birth to practically the same progeny, growing up to closely similar results. Peculiarities there were in each state, differences of detail, of form rather than of method or character; but England differs no more widely from what may be called the normal type than do other states, probably less than does Germany. Some of the English differences may be thought to be very essential elements of constitutional government, some details of the judicial system, some features of local government, the composition and organization of Parliament, and they certainly were of great assistance in the making of the constitution, but it did not come from them. All such peculiarities of the English constitution taken together would never have produced a limited monarchy. It is indeed true that the constitution was practically completed, all its great principles were established, before institutions which may be said to be peculiar to itself had come into existence. In fact the final constitution, to the present time, has consisted less in institutions that are peculiar to itself than in the fact that institutions common in their general form to many states have been used for purposes, to embody and protect ideas, not found elsewhere, and have been by degrees in consequence of such uses somewhat transformed in character. It was not in the development of the machinery of government that the difference between the French and English constitution was brought about. It is elsewhere than in institutions proper that we must look for the cause of the peculiar result. Were it not for the fact that we are often satisfied with explaining this difference by calling attention to such things as the jury, the survival of election, the composition of the House of Commons and the peculiar characteristics of the English peerage, we might have spared ourselves even so brief an introduction as this because

[3] The process of impeachment is the first thing, I think, of which exactly this may be said, though of course by the end of the reign of Edward III. Parliament had made great progress along the line described below.

institutions are always results. The idea goes before the form. The thing in its reality is already in existence, or it is rapidly coming into existence, before it takes on the guise of an institution.

It is to the realm of ideas then, that we must look to find the peculiar influence in English history which explains its peculiar result. There must have been present during the formative centuries, the thirteenth and fourteenth, some guiding principle, actively influencing affairs from time to time and producing that transformation of constitutional ideals and uses which made the English unique among governments at the close of the Middle Ages and in modern times the model of most states.

It is easy to understand upon what point in the constitution as it existed such an idea must bear; against what danger it must strive; what opposing tendency it must overcome. In England, as things had shaped themselves, there was only one rival of the constitution that was to be formed, the unlimited power of the king.[4] The one danger was that the king should retain over the modern institutions into which feudalism was changing the same absolute control under which he had held the feudal machinery. A formative idea, shaping the English constitution into a limited monarchy, must at the very start oppose the ideal of an absolute king, must proclaim that there was some limitation on his arbitrary will, and must set up limitations of such a sort as to admit of easy and constant enlargement. The tyranny of John could have been transformed into the constitutional monarchy of the Lancastrian age in no other way. A baronage determined to protect its privileges, an ambitious House of Commons, a third estate unusually influential in public affairs, could have made no such constitution except under the guidance of some general principle, by which all classes could work, in every generation alike, and which would grow consistently and continuously as the enlarging interests of men demanded.

This guiding and creative principle is to be found in the idea that there existed a body of understood, more or less definitely formulated rights which the king was bound to observe and which those who at any point of time formed the operative force of the nation had the right to force him to observe if he showed himself disposed not to do so. This principle is imperfectly stated unless

[4] It may perhaps be thought that the establishment of such an oligarchy as that threatened by the Provisions of Oxford, presents a third possibility, but not, I think, in the actual situation in England. The baronage was too weak, between the king on one side and the third estate on the other, to give rise to any real danger.

both parts are included in it. The second half, the right of coercion, was as essential a part of it as the first, more so, if that were possible, for without this right and its successful exercise the idea of a body of law above the king would probably have disappeared leaving behind it no practical result. If this is true, it follows that the real line of the early development of the constitution, of the events which by degrees called it into existence, is again not the development of Parliament, but the line of the enforcement of this right of coercion. The history of Parliament is the history of the independent and unintended formation of the institution which finally, when the idea had become firmly established, was to assume its guardianship and enforcement; but the history of Parliamentary origins and growth is not the history of the origin of the limited monarchy.

I have said that for generations this idea was embodied in no peculiar institutions, and this is true. Men devised no successful machinery to give it permanent expression. But I do not mean to say that no attempt was made to create such machinery. There was in fact much experimenting. From time to time institutions were invented, and machinery set up with the conscious purpose of enforcing this principle, and with more or less definite hope of permanence. But nothing of the sort was really successful or lasted beyond the mere occasion which called it into being. There was, to be sure, a general likeness in all these early attempts. The cases under John, Henry III., Edward II., Richard II. and Henry IV. have a general similarity of method and character. The vesting of royal powers in a commission, or the transferring of the responsibility of royal officers to Parliament were, one or both, typical features of all the cases. But open assumption of the royal power, or of any royal prerogative, by Parliament, or by any commission in name or form a creature of Parliament, was not to be the way of the constitution.

This early experimenting, of which the Provisions of Oxford is the most typical example, was all in the wrong direction, doomed to and deserving failure. And it possessed in no single instance any element of permanence. Each case grew out of a special situation and lasted only so long as the situation continued. Nor is there to be found any line of institutional connection between the cases.[5] On every new occasion when it was necessary to apply the fundamental principle, a method was devised anew and, whenever

[5] The demands for the confirmation of Magna Carta do form a continuous line of connection, but a line not of institutions. They express rather the idea which lay behind all the experiments. I shall have something to say of these demands in my second article.

any line of connection between two cases can be made out, it is at best only one of precedent and remembrance, and not of the continuous growth of an institution. Even precedent does not accumulate. No advancement is apparent. No later case builds on its predecessors, or goes on to improve what had been before into a more perfect or lasting instrument for controlling the king. The instances are individual, disconnected and unprogressive, but they must not be taken therefore to prove that in the meantime the fundamental principle had fallen out of sight.

But while this abortive experimenting had been going forward, there went on a quite independent line of evolution which is characterized by all that these attempts lack. It is continuous, cumulative and progressive. At first it had nothing to do with the coercion of the king, gradually more, and from the end of the fourteenth or early in the fifteenth century it absorbed into itself the line of experiments which before had been without permanent result, and became the sole guardian of the interests of the nation as against the king. This is the evolution of Parliament, or to distinguish and to name that which really evolved and which brought about the great result, it is the evolution of the House of Commons. That evolution, so far as we are concerned with it, however, did not consist in any perfection of Parliament as an institution. The constitutional result was not reached because there were two houses instead of three, nor because the minor nobility united with the burgesses to form the House of Commons, nor because of the growing definiteness of constitution and organization of Parliament as the fourteenth century went on. Improvement of machinery assisted the process, but only by rendering it easier and more likely to be continuous.

What made Parliament finally the embodiment of the fundamental principle of the constitution was the fact that through the whole fourteenth century it had been steadily enlarging the body of law which the king must observe, and in most important particulars. Beginning with and assuming control of the specific principle that there should be no taxation without consent, Parliament gradually made clear its bearing and enlarged its scope to include all sources of revenue except those of the feudal suzerain, and indeed encroached most seriously on these in the matter of tallage. From this vantage ground it reached forward to the assertion, not yet fully understood in all its bearings, that the king's expenditure of his revenue should be limited by the specifications of the grant. During the same time in a different direction, Parlia-

ment was making another addition to the law which the king must obey, more difficult and also more significant and decisive, because wholly new. This was the establishment of the principle that the House of Commons must be consulted and consent to every new act having the force of law. In demanding that its consent should always be obtained to taxation, Parliament was only assuming to itself the exercise of a right of the individual vassal which the feudal law had clearly and everywhere recognized and which the Great Council, as standing for the class, had assumed before the existence of Parliament. As the feudal income broadened out to meet the exigencies of the modern state, Parliament insisted that the principle of consent should broaden also to cover all forms of taxation. This was a logical demand, and even a king like Edward I. found that it had been so strongly fortified by the earlier events of the thirteenth century that it was not possible to resist it, and he was forced against his will to restore it to the Great Charter. But in assuming an exclusive right to make new laws, the Parliament of the fourteenth century was taking a position in which it could find no support in the old feudal constitution and which was an enlargement of the law above the king almost revolutionary in character. It is likely that no such assumption could have been made, and clearly it could not have been established but for the progress which Parliament had made in the matter of taxation. There had been very little that may be called new legislation in the feudal age, but what there had been was the act of king and *curia.* In this, as in other respects, there had been no distinction between the great and the small *curia,* and in this, as in other respects, the functions of the old *curia regis* descended along the line of the Council as legitimately as along that of the House of Lords.[6] For Parliament to assert that an act of legislative character by the king and the upper house, or by the king and the Council,

[6] See my article on the *Descendants of the Curia Regis* in the last number of this journal. It is to be said in modification of the text that some distinction did exist between the two bodies in practice, but it was like that which existed between them in the judicial function of the *curia.* It was based on the importance of the case or of the parties concerned. It was a distinction of fitness, of convenience, determined by the specific occasion, and not growing out of a difference of function or of right. In other words it was not a distinction of an institutional nature. Probably to complete the explanation of this advance there should be taken into account the rapid dying out of political feudalism, and indeed of the most fundamental feudal distinctions, which accompanied the early stages of Parliamentary history. Had the feudal point of view been retained, even no more perfectly than in the first half of the reign of Henry III., it is likely that the development would have taken the more normal form of a co-ordinate, rather than a supreme legislative right in Parliament.

must not have the same force as a statute, was to go counter to all precedents not merely of feudalism at its height, but of the thirteenth century as well. But this it did assert and in the end, so far as the main point was concerned, the king yielded.

But it was not alone, though chiefly, by enlarging the law which binds the king that Parliament was becoming the guardian and creator of the constitution. In beginning to audit the treasurer's accounts in the reign of Edward III., in the party struggles of the close of that reign and the first years of the reign of Richard II., in the application of old principles and forms to the new use of impeachment, in the coercion of Richard in the first part of his reign, and in the successful revolution at it close, Parliament was advancing by other steps than the making of new law to stand in the balance over against the king, and to assume the direction of constitutional growth. This is the period, the last part of the fourteenth century, when, as I think, the two lines of development which had been going on really apart, the natural development of Parliament and the line of experimenting in methods of coercing the king, really coalesce into one, and henceforward the natural development of Parliament and its powers is at the same time the natural development of the limited monarchy. The Lancastrian period, startlingly and prematurely modern, is an age when the idea and practice of Parliamentary leadership grew familiar and came to seem the natural and traditional order of things, not with all the fullness of understanding of later times, it needed the struggles of the seventeenth century to produce that, but clearly enough to insure their permanence. As compared with this result, we cannot say that the establishment of freedom of debate and the other privileges of Parliament, or of the control of elections, are essential enlargements of the law to which the king was subject.[7] The age which followed the Lancastrian was one of suspended activity, or of reaction, or more accurately it was one during which Parliament gained the same degree of control over the ecclesiastical organization of the state which it had already acquired over the political. At its beginning the answer of a Yorkist House of Lords to Richard of York's claim to the throne is a constitutional landmark of the utmost significance, and in many ways it might be shown that the English constitution of 1460 was of a type new to the world. Into the details of these later times we do not need to go for our present purpose.

[7] The practical importance, however, of a case arising under these rights, the case of Goodwin and Fortescue, at the beginning of the reign of James I. should not be overlooked. It brought the king face to face with the constitution, and taught him the existence of a body of law which he could not contravene.

We now return to our original problem but in more specific form: how and when did there enter English history the principle that there is a body of law above the king which he may be compelled to obey if he is unwilling to do so? Continued study of this question leads me only to a restatement of my earlier opinion,[8] that it was the work of Magna Carta to transfer this principle from the feudal to the modern state, and that in this fact we have the explanation of the influence and significance of the Great Charter in English history.[9]

That there was in the feudal system of things a body of law, of recognized right, which the highest suzerain, the lord paramount of the realm, could not violate, hardly needs, I think, to be proved to anyone familiar with feudal law. Underlying all of

[8] See vol. V. of the REVIEW (1900), p. 650; and *The Political History of England,* II. 439 (1905).

[9] It has been suggested that in this opinion I have followed Professor Maitland. In one sense this is true. My publication did follow his; see Pollock and Maitland, *History of English Law,* first ed. (1895), I. 152. But, what I understand the suggestion to mean, that my view of the Charter was derived from his, is certainly not the case. I have been very glad to find myself reaching the same result as so distinguished a scholar, and the fact has undoubtedly given me greater confidence in my conclusions, but those conclusions were entirely independent, reached by a different road and resting on a different body of fact. My original approach to Magna Carta was not through English history or law, quite the reverse; nor did I reach my present understanding by an analysis of it as primarily an English document. I came to the study of it directly from the study of continental feudal institutions and law with which I had occupied what leisure I found for some years. Called upon for class-room purposes to read the document carefully for the first time since my special interest in feudalism had begun, I remember clearly the astonishment with which I recognized the fact that it was practically pure feudal law both in its details and in its underlying principle. There speedily followed the conclusions that England must have been a thoroughly feudal state, as I had not before supposed it to be, and that in the fundamental principle of feudal law, which is also the fundamental principle of Magna Carta, we have the explanation of the influence of that document in English history and the key to the origin of the constitution. It was this conclusion which turned all my interest to the study of early English history to which up to that time I had given no attention, and it was reached before I had read the *History of English Law,* or to my present recollection any other of Professor Maitland's writings. It led me to their study. His conclusion appears to me to rest on an analysis of Magna Carta itself, and I do not understand that he ever fully appreciated its relation to feudal law in general, or developed in his thought, as he could hardly have failed to do if he had given attention to the point, the relation of the fundamental principle of Magna Carta to the origin of the constitution. I have stated these facts so fully not from personal reasons merely, but because it seems to me one method of asserting with emphasis that I believe it to be indispensably necessary, if one would understand the origin of the English constitution, to understand first of all the real meaning of Magna Carta and its relation to the fundamental contract idea of feudal law.

feudalism, practices, law and institutions, was the fact of contract.[10] The feudal relationship was created by a contract; it could be created in no other way. The fact that the terms of that contract were often, probably usually, unwritten is of no importance. Homage, fealty and investiture were the well-understood forms of making such a contract, and the custom of the locality defined clearly to both parties its terms, if no special variation from the ordinary in a given case required special definition. Now this fundamental contract of feudalism was everywhere regarded as contract always is: it bound both parties alike, not to quite the same things, but equally. It requires no long study of any feudal code to see that it all rests back on a contract, and a contract binding the sovereign as truly as the lowest vassal. So far as this principle relates to the ownership of land it is of no importance, for private property and royal grants must be to a degree secure in any régime. It was the peculiarity of the feudal system that it brought under the operation of this same principle public relationships and duties and nearly the whole body of public law.[11] The vassal class, those who entered into the feudal relationship and who formed, while feudalism was at its height, practically the whole operative force of the state, bound themselves by the initial contract to certain public duties, financial, military, legislative and judicial, and to no more. We are here especially concerned with this fact from the suzerain's side. Of the services by which public business was carried on, he could demand of the individual vassal only those which the particular contract specified. The

[10] No one, I am sure, will suppose that in declaring Magna Carta to rest for its justification on the fundamental contract of feudalism, I am asserting that it was itself a contract between the nation and the king. Such an interpretation of the Charter appears to me wholly wrong. It assumes the existence in 1215 of a nation in the later sense, long before such a thing had come into being, and it assumes the existence of a political idea and theory even more impossible to the time. In saying that, as a statement of what the king is bound to do or not to do, it rests on the fundamental contract of feudalism, I am saying merely that it is a statement of feudal law. It was not Magna Carta but the circumstances of the future which gave to the fact that there was a body of law above the king creative power in English history. Magna Carta emphasized the fact and made the suggestion of the right of enforcement, in a way never forgotten, but this was all it did. Nor did feudal law furnish, except in a few particulars and these much transformed, the body of law by which the king was bound. The great work of Magna Carta was not done by its specific provisions; the secret of its influence is to be found in its underlying idea.

[11] Not quite all: see note 15 below. The definition of feudalism, that it is a system of things in which private law has usurped the place of public, is probably well known, but to me at least it does not seem that the bearings of this fact on English constitutional history have been seen as clearly as they should be, nor its consequences followed to the end.

only point of vagueness in that contract was the obligation assumed by the vassal to serve his lord with honor and loyalty. There was nothing about this, however, which allowed the king to demand of the vassal without his consent further money payments than those specified, or more military service, or in different conditions of time or place, or to infringe his rights of private jurisdiction, or to subject him to a different mode of trial from the usual feudal, much less to punish him without trial no matter what he had done. In these particulars and others like them every feudal sovereign was a limited monarch, and the history of every feudal state gives evidence of the enforcement of these limitations against the king. This was just as true of the strong Norman kings as of any others,[12] though they were the most powerful of all feudal sovereigns, and every reign up to Magna Carta shows the existence and effectiveness of these checks.[13] Everyone of them in some way recognized the fact that there was a body of law which he must observe. Particularly is this the meaning of the charter of Henry I. Like Magna Carta it contains very little that is new, but it rests on the fact that William Rufus had been doing things which he had no right to do and which the barons had the right to bind his successor in terms not to do.

If now we turn to Magna Carta we find in the first place that the conditions which called it into existence were precisely of a sort to demand the enforcement of this fundamental principle of feudalism. Looked at from the point of view of the feudal baron, John had been during the greater part of his reign constantly violating the feudal contract. To enumerate the particulars would be to name the larger part of the clauses of the Great Charter,[14] but two particulars seem to have stood out to that time as especially wide-reaching in their consequences: John's financial methods and his disregard of judicial rights. Of course in neither of these respects was John an innovator; he was only following in the way opened by his father and brother. But circumstances had

[12] Plehn, *Matheus Parisiensis,* p. 1, notes this fact, but does not state quite accurately the reason for it.

[13] Interesting instances of this fact in the case of the stronger kings are to be found in the failure of the demands of William II. regarding Anselm in the meeting of the *curia regis* at Rockingham in 1095, of the request of Henry II. for a change in the object of the "sheriff's aid" at Woodstock in 1163 and of the request of Richard I. for the feudal service in an unusual form at Oxford in 1197.

[14] Magna Carta does not state all the points of which the barons had earlier complained. It is discreetly silent on the subject of military service in France, for instance, which they had asserted the king wrongfully required. In this they were not right, and it is some evidence of the justice and exact legality of the Charter that it does not put forward such a claim.

forced him to go forward in taxation farther than any one before him and, if this was not so true of the judicial system, the barons were now able to understand more clearly the result for themselves of the judicial changes, and also they might naturally connect with them, as showing their logical tendency, John's habit of arbitrary punishment without judicial process.

As we look at the issue between the barons and the king with our understanding of later times, our sympathies may perhaps be mixed. It is easy enough for us to see that John was at work in the way of the future. The changes which he was striving to make were inevitable and necessary. The transformation which he was helping to carry through was the transformation of the medieval machinery of government into the modern. To this extent we may sympathize with him. But John was carrying forward this work decidedly under the influence of the tendency which seems to have been common in decaying feudalism, the tendency towards absolutism. If also we look at the matter strictly from the feudal point of view, it is impossible not to say that the barons were right. John's acts may have been steps towards a better future; but some of his methods of raising money he had no legal right to employ, the interference with private jurisdiction by the writ *Praecipe* was without justification,[15] and the trial by their peers repeatedly demanded by victims of his tyranny, he could not justly refuse. In every particular touched upon in Magna Carta so far as it was a part of the old feudal law, the barons were wholly within their rights.[16] They were stating law by which the king was already bound, as in his heart he must have admitted.[17]

[15] That is, without justification in feudal law. In issuing the writ the king acted on his general right to make justice prevail, and to demand obedience to his writs. See Brunner, *Schwurgericht*, p. 405; Flach, *Origines de l'Ancienne France*, III. 366, n. 3. In other words he found his authority in an older ideal of his office which had survived in some particulars and which, wherever acted on in practice, was the source of inconsistencies and contradictions in the feudal world. In this case the fact should not be overlooked that the king used it to deprive his vassal of a property right, a source of income, which the feudal law affirmed to be his as truly as his domain manors. That the political system from which the right was drawn was not merely older but sounder and more permanent, has nothing to do with the case. By the system which was then ruling such matters and which had ruled them for generations, the act was unquestionably illegal.

[16] It will be noticed that some clauses, for example, clause 25, are not included under this statement.

[17] As soon as he was able John denounced the Charter and procured its annulling by the pope. From the precedents established by his father and brother he was right enough in doing so, but to justify himself by a real and not a usurped right, he must fall back on that older conception of the kingly office,

But here was the practical problem. The barons knew well enough that legal right, as the law then stood, was on their side, but how was it to be enforced, how to be secured for the future against such a king? None of his predecessors had been stronger than he, none indeed had given such an exhibition of strength, had seemed so unshakable, or had held an unwilling nation in such a grip of iron. If defeat abroad and combination at home at last placed him at a disadvantage, how was the recovery of his tyranny to be prevented? How was the law to be made secure against his arbitrary will when the combination was broken up and his strength restored? This, the one urgent problem of the time, gives us the explanation of Magna Carta; how to deal with a king who persistently refused to obey the law which he was rightfully bound to obey and whose promises could not be trusted, how to deal with him in such form as not merely to secure incontestable recognition of the fact that he was bound to obey the law, but also an accepted, legal and orderly means of forcing him to obey if he should break his promises.

This is the explanation of Magna Carta so far as that is given by the historical situation which produced it. The written document gives us the same result. It was suggested of course by the charter of Henry I., and when the archbishop produced a copy of that charter its special fitness for the occasion must have been

not recognized by the feudal law, to which I have referred in note 15. In that conception of king and state there was in truth no room for the principle on which the barons acted, but it was a conception which had had small share in the world, outside infrequent books of scholars, for more than two centuries. It may be said that the right to control the sovereign by force was merely an application of the general right of revolution which exists under any government, or that it was due in successive cases to the action of underlying economic and social causes whose operation may be stated in abstract terms. See my *Civilization During the Middle Ages,* p. 99, n. 1, and *cf. Polit. Sc. Quart.,* XXI. 535. Such statements contain some degree of truth, and in the final narrative of human history they will be allowed due weight, but to the present-day work of the political historian they offer nothing of value. They are either equally true of all cases whatever their special form, or they deal with influences acting in so removed a degree, through secondary or tertiary agents, that they tell us nothing of what actually occurred, or of what the actors in events believed. Nor do such generalizations ever take account of the external forms of the body of institutions, which condition to some extent, and in their forms record, advance or decline. Whatever may be the business of the student of political science, or of the sociologist, it is the business of the historian, in the present stage of knowledge, not to deal with hidden causes, or with abstractions, but to find out what actually occurred and to describe as accurately as possible the immediately accompanying forms and ideas and the process of change. Nor personally do I believe that it is of value in any science to seek for ultimate causes until the phenomena are accurately known.

clearly seen. Once more as by the earlier king, the law had been violated, and once more it was necessary to secure a pledge that those violations should cease. This gives us the body, the greater part, of the Charter. But in one point the case differed from that of Henry I. and in one point the Great Charter goes beyond the earlier one. The king from whom the pledge was demanded was the king who had violated the law. If the charter of Henry I. had been forced from William Rufus by insurgent barons, it probably would not have stopped where it did. Then, as in 1215, the difficult question would have forced itself forward how to compel the king to keep his pledge if he should again violate the law. To this question the barons of John found an answer where they found the right to proceed originally against the king, and to make the specific demands which they embodied in the Charter.

We should be led, I believe, to the same explanation of Magna Carta as a document, if we knew nothing of the charter of Henry I. The key to its meaning and to the right on which the barons founded it, is clause 61. Of that clause there are two questions to be asked: first, exactly what was it intended to do; and second, on what ground of right did it rest. In the first place the general purpose of the clause lies plainly on the surface. It was to compel the king to keep the engagements he had entered into in the Charter. John had agreed to be bound by certain statements of law, mostly old, some new, embodied in the earlier clauses. In ordinary cases this would be enough. The king's promise in the form of a legal grant would be all that would be asked for. It is clear that John's promise was not trusted. The question how he could be forced to keep it would arise as soon as men began to consider the drawing up of a charter at all. It is possible that it was this question which led to the withdrawal of the northern barons, recorded by the Barnwell chronicler.[18] Their spirit was such that they may very likely have said: it is utterly useless to try to bind the king with any sort of agreement; the experiment is not worth making. At any rate in the case of John the question of compelling him to keep his promise would be as immediate and pressing as any arising about the Charter. It is clear that in this difficulty the final appeal against the king would be to that which had originally forced the Charter from him—to insurrection. But obviously also this should be only a final appeal. The thing to be done was to devise some method of enforcing the provisions of the Charter, when the king proved unwilling, which would

[18] Walter of Coventry, II. 222.

secure the rights granted, to which the king would agree, and which would involve insurrection only as a last resort. That is the specific object of the clause—to set up machinery which will take hold of abuses when the king refuses to reform them, enforce and protect the rights of the persons interested, and do so as recognized machinery of the state without a resort to force. The real nature and purpose of the clause is to be seen from the way it would have worked in practice. To four barons of the twenty-five, the individual was to bring his complaint of some wrong which he could not get corrected. Plainly then the four must decide whether the case was one of real abuse and one intended by the Charter to fall within their supervision. That is to say the clause conferred upon them a judicial function, which was really a prerogative of the king's, to determine whether the law had been violated or not in a given case, and to grant redress. If the four found an abuse, they carried the case to the twenty-five, when of course their decision was subject to review. If the twenty-five, or a majority of them, agreed with the four, they called the attention of the king to the abuse and required him to redress it within forty days. This is all the king had to do with the case. He had no voice in the decision. His judicial prerogative of determining violations of the law and initiating their correction was taken away from him, and he was reduced to the function of executing the judgments of a court not his own. This was moreever under the sanction of civil war. If the king still refused redress the last resort was insurrection, which is declared legal, and defined as limited in character, and temporary only. Permanent deposition of the sovereign was carefully excluded. A clumsy arrangement, impossible to operate with success no doubt, but we should never forget that it was the first step ever taken in history towards what we know as a limited monarchy, towards the creation of a body of constitutional law which the king must obey under sanction of insurrection. Considering that the men of 1215 had no precedent to go upon, no model of any such machinery to follow, no literary expression of such ideas, or theorizing about such procedure, they did very well. The scheme was conceivably workable, practice would no doubt have disclosed fatal defects, but practice was exactly what nobody had as yet. The character of the scheme however is clear. It was a method which it was hoped would secure the enforcement of the Charter by putting into operation through others a function naturally belonging to the king but which he refused to exercise for the ends of justice, under the

ultimate sanction of war. As I have said of the plan in general, it was not finally to be the way of the constitution. Transfer to others of the king's prerogatives, definite formulation of sanctions, legalization of insurrection, these were not to be in the end constitutional. But until Parliament had come into existence and had so far developed that it could begin to exercise in reality prerogatives to which it laid no claim in theory, until it could begin the long process of transferring the real sovereignty of the state to itself, expedients of this kind were the only possible means of enforcing law and limitations upon the king, and it was in them that the constitution had its origin.

Of the second question, on what ground of right did clause 61 rest, the answer is equally plain and has already been made. The clause rested on the same ground of right as the insurrection which had forced the Charter from the king. In the machinery of the court of twenty-five and in the modified and temporary right of insurrection which it recognized, the clause falls within the limits of the larger right. None of the insurgent barons would have admitted for a moment that he was guilty of treason, nor could the king, with due regard to the law, have proved him to be by the mere fact of insurrection.[19] It would be necessary for him to prove that there was no legal ground for the *diffidatio* which had been served upon him. There are indications which seem to imply that between 1210 and 1215 there was some feeling about in the minds of those who were preparing to oppose the king's tyranny for some legal ground of action against him. The theory of the old elective monarchy, which had been perhaps revived by the question of Arthur's title, seems to have been thought of. This probably accounts for the tradition about Archbishop Hubert's

[19] Feudal law may be said, indeed, to have recognized with peculiar clearness the right of the vassal to make war on his suzerain when that suzerain was the lord paramount, because there was in that case no higher authority to which appeal could be made. It will be noticed also that deposition was the only form which the extreme penalty could take, which in the case of the mesne lord was confiscation, *i. e.*, the raising of the rear fief to be an immediate fief. See the references in *The Political History of England*, II. 439, n. 1. One of the most interesting statements of this right is that in the *Etabl. de S. Louis* (ed. Viollet), II. 75 (book I., c. LIII.), because it covers the duty of the rear vassal. The lord says to his liege man: "Come with me because I wish to make war on the king, my seignior, *qui m'a veé le jugemant de sa cort.*" The man answers that he will go to the king and find out if the fact is as stated. If it is, he returns to his lord. *Et se il ne s'an voloit aler o lui, il en perdroit son fié par droit.* It will be noticed that the case supposed in the passage as calling the right into action is one of the chief grounds of complaint against John. The point with regard to treason, as a result in his case of the reverse process, the king's *diffidatio* of him, is clearly made in 1233 by Richard Marshal in argument with the king's representative. Matt. Par., III. 257–258, and *cf.* 274–275. See also the case of the Earl of Albemarle in the annals of Dunstable, *Ann. Mon.*, III. 64.

speech at the coronation of John, which Louis adapted to his own use in his manifesto of 1216, and which Matthew Paris recorded, probably more nearly in its original form. The coronation oath seems also to have suggested itself as a means of control, and this fact may possibly account for the form of oath which was demanded of John after the removal of the papal censures in 1213.[20] But however it may have been with regard to such speculations, when the time for action came they were all fortunately dropped, and the baronage in insisting upon the king's feudal obligations fell back upon the natural and simpler feudal right of appeal, the *diffidatio* and its accompanying right of insurrection. This feudal principle accounts fully for the clause, and it is the only source from which its justification can have come. Had the barons acted on any other ground of right existing at the time, like election or the coronation oath, the clause must have taken another form.

The body of Magna Carta and clause 61 constitute together the first inclination of the constitution towards a limited monarchy and mark the point of time before which no tendency in that direction can be found, the one as insisting that there is a body of law which the king is bound to observe, the other as affirming that the community of the ruled has the right to set up machinery to enforce the king's obligation, and, if this proves insufficient, to levy war upon him. It is a beginning only, as yet incomplete. The body of law contains very little of that to which the king was subject in 1460; the machinery of enforcing it is less elaborate and perfected than that of 1258 or 1310; the method of protection is quite different from that of the seventeenth century. But it contains in germ all that followed; from it the whole constitution unfolded. Now this beginning is in the feudal system. Before 1215 in the history of English institutions, general as distinguished from local, lies nothing but the feudal system, modified only in the direction of a more absolute monarchy. The two fundamental principles of the constitution which Magna Carta declared were both fundamental principles of feudalism and were drawn directly from it in 1215. The origin of the English limited monarchy is to be sought not in the primitive German state, nor in the idea of an elective monarchy or a coronation oath, nor in the survival of institutions of local freedom to exert increasing influence on the central government. Though all these were contributary, combined they could not alone have produced the result. The principle which moulds and shapes all elements into the great result came from feudalism. GEORGE BURTON ADAMS.

[20] Roger of Wendover (ed. Coxe), III. 260; (ed. Hewlett), II. 81.